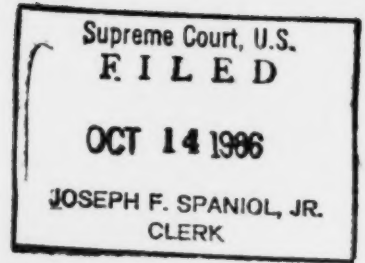


86 -7 43



In the  
Supreme Court of the United States

October Term, 1986

No. \_\_\_\_\_

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WILLIAM K. ZIECHMANN, et al.,  
Petitioner,

vs

CHARLOTTE ADOMAITIS, et al.,  
Respondents

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**PETITION FOR A WRIT OF CERTIORARI**  
**To the Court of Appeals**  
**of Ohio, Eighth District,**  
**Cuyahoga County**

Matthew Gilmartin, *Counsel of Record*  
9267 Basswood Drive  
Olmsted Falls, Ohio 44138  
(216) 235-9755  
*Counsel for Petitioner*



## **QUESTION PRESENTED**

1. Whether dismissal of the Plaintiffs' complaint for failing to state a claim upon which relief can be granted and res judicata, in contravention of Ohio Revised Code §2717.02, denied the Plaintiffs due process of law as guaranteed under the XIV Amendment to the United States Constitution, by denying the Plaintiffs their day in Court.

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## **TABLE OF AUTHORITIES**

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William K. Ziechmann, et al.,  
Petitioners,

vs.

Charlotte Adomaitis, et al.,  
Respondents.

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**Petition for a Writ of Certiorari  
To the Court of Appeals of Ohio  
Eighth District, Cuyahoga County**

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Petitioners, William K. Ziechmann, et al., prays that a writ of certiorari issue to review the judgment Court of Appeals of Ohio, Eighth District, Cuyahoga County, and the Court of Common Pleas of Cuyahoga County, dismissing the Plaintiffs' Complaint for declaratory relief, the imposition of a constructive trust, and damages, on the basis that the Plaintiffs' complaint failed to state a claim upon which relief can be granted and res judicata, as per Ohio Rule of Civil Procedure 12(B) (6).

## PARTIES

### Petitioners:

William K. Ziechmann  
John Ziechmann  
Dietz Ziechmann  
Karin Ziechmann  
Alexandra Ziechmann

### Respondents:

Charlotte Adomaitis  
Rippner, Schwartz, & Carlin  
Angela Carlin  
Richard Schwartz  
Sanford Schwartz  
City of Shaker Heights, Ohio  
William Gollnick  
Lore Gollnick  
Theodore Gollnick  
Mark Gollnick  
Timothy Flanagan  
Carey N. Gordon

## **OPINIONS BELOW**

Denial of the Plaintiffs' Motion to Appeal to the Supreme Court of Ohio (App. 1) is not yet reported.

The opinion of the court of Appeals of Ohio, Eighth District, Cuyahoga County, rendered March 13th, 1986, (App. 3) is unreported.

The Findings of Fact and Conclusions of Law and Opinion, by the Court of Common Pleas of Cuyahoga County, rendered September 4th, 1985, (App. 13) is unreported.

## **JURISDICTION**

The judgment of the Supreme Court of Ohio was entered on July 16th, 1986. This Court has jurisdiction under 28 U.S.C.A. §1257(3). The issue of O.R.C. §2717.02, and by inference the XIV Amendment to the U.S. Constitution was first raised in Petitioners' Motion to Certify to the Supreme Court of Ohio.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fourteenth Amendment to United States Constitution, section 1., which states:

1. \*\*\*No State shall make or enforce any law which shall abridge the privileges or immunities of a citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law,\*\*\*.

Section 2717.02 of the Ohio Revised Code, "FORCE AND EFFECT OF DECLARATORY JUDGEMENTS."

"Courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. *No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for.* The declaration may be either affirmative or negative in form and effect. Such declaration has the effect of a final judgment or decree."

### STATEMENT OF THE CASE

Plaintiff-Petitioner, William K. Ziechmann, is a beneficiary (nephew) of the Estate of F. Karl Ziechmann, who died testate on December 20th, 1978. According to the terms of the will, certain parcels of land were to pass into a testamentary trust, the beneficiaries of which were the Plaintiff-petitioners in this action. It was not until almost four years after the will was probated that a trustee was appointed to this testamentary trust who could protect the interests of the beneficiaries. Between the time the will was presented for probate and when a trustee was finally appointed, Executrix Charlotte Adomaitis sold the real property which was to be the res of the trust. This sale took place without the consent of a majority of the beneficiaries as required by the terms of the will. The executrix did this upon the fraudulent pretext that the value of the estate's debts exceeded the value of the estate's personal property. Since the executrix violated her duty to satisfy the debts of the estate by first exhausting the personal property assets of the estate before selling any of the estate's real property, the Plaintiff-petitions brought an action for declaratory judg-



ment that the sale of the property by the defendant-respondents was illegal and violated the terms of the will. A trial by jury and money damages were asked for in the pray for relief.

The appeal is from a judgment of the Court of Common Pleas dismissing Plaintiff-Petitioners' complaint as failing to state a claim upon which relief can be granted and res judicata. This judgment was affirmed by the Eighth District Court of Appeals, Cuyahoga County, Ohio, and the plaintiff-appellants' Motion to Certify to Supreme Court of Ohio was denied.

### **REASONS FOR GRANTING THE WRIT**

§2717.02 of the Ohio Revised Code state in its pertinent part: "No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for." The plaintiff-petitioners asked for a declaratory judgment, and the Court of Common Pleas dismissed the case on this basis and that of res judicata. Res judicata is vacated by fraud, which the plaintiff-petitioners averred in their complaint. The Courts' of Ohio dismissal of the plaintiff-petitioners' complaint denied them due process of law in violation of the XIV Amendment to the U.S. Constitution, by denying them their day in court.

Respectfully submitted,

Matthew Gilmartin  
Attorney for Petitioners  
9267 Basswood Dr.  
Olmsted Falls, Ohio 44138  
(216) 235-9755  
Counsel for Petitioners



## **APPENDIX**



## **THE SUPREME COURT OF OHIO**

William K. Ziechmann,	:	Case No. 86-750
et al.,	:	
Appellants	:	July 16th, 1986
	:	
-vs-	:	
	:	
Charlotte Adomaitis,	:	
et al.,	:	
Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record and the claim appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

Frank D. Celebrezze  
Chief Justice

**COURT OF APPEALS OF OHIO  
EIGHTH DISTRICT CUYAHOGA COUNTY**

William K. Ziechmann,	:	Appeals No. 50264
et al.,	:	
Appellants	:	April 7th, 21986
-vs-	:	
Charlotte Adomaitis,	:	
et al.,	:	
Appellees.	:	

Motion by appellant for reconsideration is overruled.

John V. Corrigan  
Presiding Judge

Parrino, C.J. &  
Ann McManamon, J. Concur

**COURT OF APPEALS OF OHIO  
EIGHTH DISTRICT  
COUNTY OF CUYAHOGA COUNTY  
NO. 50264**

William K. Ziechmann,	:	Journal Entry
et al.,	:	
Plaintiff-	:	March 13th, 1986
Appellants	:	
-vs-	:	
Charlotte Adomaitis,	:	
et al.,	:	
Defendant-	:	
Appellees.	:	

**JUDGMENT:**

**AFFIRMED.**

This is an appeal from a judgment of the Common Pleas Court dismissing plaintiffs' complaint for declaratory judgment pursuant to Civ. Rule 12(B)(6).

Plaintiff, William K. Ziechmann, is a beneficiary (nephew) of the estate of F. Karl Ziechmann who died testate on December 28, 1978 leaving a will and five codicils.<sup>1</sup>

Plaintiffs sought a declaration that the sale by defendant of a house and two parcels of land by defendant executrix Charlotte Adomaitis to defendant City of Shaker Heights was illegal and violated the terms of decedent's will.

<sup>1</sup>Also named as plaintiffs are John Dietz, Karin and Alexandra Ziechmann.

Appellants raise the following assignment of error for this court's review:

THE COURT ERRED IN ITS FINDING OF FACT AND CONCLUSIONS OF LAW FILED ON APRIL 16, 1985, IN THE SUBJECT ACTION.

This assignment of error lacks merit.

Appellants specifically argue that appellee Adomaitis had no authority to sell these subject parcels of real property to appellee City of Shaker Heights. Appellants state that there were sufficient funds to pay any personal property obligations of the estate. Appellants also state that appellee Adomaitis failed to notify Probate Court of her intention to sell these parcels of real property in order to satisfy the personal property obligations of the estate.

Pursuant to Item IV of the decedent's will, decedent created a trust for the benefit of appellant William Ziechmann which consisted of residential property located at 2920 Warrensville Center Road, Shaker Heights, Ohio, known as Permanent Parcel No. 733-23-27. In accordance with Items IV and VII of the will, this property was to be sold and one-half of the proceeds were to be held in trust for the benefit of appellant William K. Ziechmann. The sale of the real property at 2920 Warrensville Center Road is not challenged by the appellants.

The City purchased this parcel in addition to two adjacent parcels of land (Permanent Parcel Nos. 733-23-26 and 733-23-12) for the sum of \$160,000. It is the sale of these two adjacent parcels of land that is being challenged by appellants.



Prusuant to Item VI of decedent's will, the residue and remainder of his estate was to be distributed in equal one-half shares to appellant Ziechmann and decedent's niece, Lore Gollnick. This residue and remainder consisted of the two adjacent parcels of land sold to the City. Appellant Ziechmann's share was to be held in trust for his benefit.

In Item IX of the will, the decedent appointed Society National Bank and Charlotte Ziechmann (aka Adomaitis) as co-executors of his will. They were expressly authorized and empowered to:

*“\*\*\*compound, compromise, settle and adjust all claims and demands in favor of or against my estate, and to sell at private or public sale, at such prices and upon such terms and conditions as they may deem best, any part or all of my property, real or personal, needed to pay debts or general bequests, and to execute, acknowledge and deliver deeds and other instruments of conveyance therefore to the purchaser or purchasers.”* (emphasis added).

Society National Bank declined to act as co-executor of decedent's estate, and appellee Adomaitis applied for Testamentary Letters and become sole executrix of the decedent's estate.

The assets of the estate wre determined to be \$270,948.71, seventy-two percent of which consists of real estate, and the debts of the estate were determined to be \$119,187.26.<sup>2</sup>

The record indicates that it was plaintiffs' position that the debts of the estate did not include fiduciary and attorney fees, administrative costs and expenses and

Ohio and Federal estate taxes. According to appellants' calculation, the debts of the estate totalled \$46,715.22 only, which would mean that the sale of these parcels was unnecessary.

R.C. §2117.25(A) provides that costs and administrative expenses are debts of the deceased and are properly payable out of the assets of the estate.

It is well settled that the amount of Federal estate tax is to be deducted like other debts and expenses of administration. *Campbell v. Lloyd* (1954), 162 Ohio St. 203; *Weeks v. Vandever* (1968), 13 Ohio St. 2d 15.

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<sup>2</sup>The assets are composed of the following:

Tangible personal property (including monies in various bank accounts, items of personal property, furniture and household goods).	\$ 44,313.35
Intangible personal property (including various notes and debts receivable).	30,885.36
Real Property	<u>195,948.00</u>
	<u><u>\$270,948.71</u></u>

The debts include: fiduciary and attorney fees, administrative costs and expenses, debts and claims against the estate, Ohio and Federal estate taxes.

An executor's fees are statutorily provided and are properly considered to be administrative expenses. R.C. §2113.35. Pursuant to R.C. §2113.36, the Probate Court may grant the executor additional compensation for actual and necessary expenses and for extraordinary services not required of him in the ordinary course of his duty. *In re Estate of Brown* (1954), 98 Ohio App. 297. The Probate Court made such a finding in the present case.

Also, R.C. §2113.31 provides for management of real estate by an executor or administrator. An executor of a will is not required to comply with procedural requirements where the will specifically directs the executor to sell property. *Bilikam v. Bilikam* (1982), 2 Ohio App.3d 300.

Thus, appellants' position that appellee Adomaitis had to notify Probate Court of her intention to sell these parcels is incorrect.

An independent basis for appellees' motion to dismiss was *res judicata*. The record indicates that the third partial accounting approved by Probate Court included the proceeds from the sale of the two vacant lots. At no time did appellants file exceptions to the accounting objecting to the sale of these parcels as provided in R.C. §2109.33. The court duly ordered this account approved, settled and recorded.

R.C. §2109.35, Effect of order settling account, provides that an order of Probate Court upon the settlement of a fiduciary's account has the effect of a judgment and may only be vacated as provided in that statute.

The court in *Third National Bank & Trust Co. v. Gardner* (C.P. 1970), 53 Ohio Op.2d 261, decided that a declaratory judgment proceeding is not one of the

methods provided in R.C. §2109.35 for vacating an order of the Probate Court upon the settlement of a fiduciary's account.

R.C. §2109.35 provides in pertinent parts:

A person affected by an order settling an account shall be deemed to have been a party to the proceeding wherein such order was made if such person was served with notice of the hearing thereon in accordance with section 2109.33 of the Revised Code, waived such notice, consented to the approval of the account, filed exception thereto, or is bound by section 2109.34 of the Revised Code; \*\*\*.

The Probate Court specifically found that all persons required to be given notice of the hearing had been given notice or had waived notice.

An adjudication by the Probate Court that certain inventoried property constitutes assets of a decedent's estate is *res judicata* as to the parties of such proceeding unless successfully appealed. *Bolles v. The Toledo Trust Co.* (1940), 136 Ohio 517; *In re Estate of Binder* (C. P. 1937), 25 Ohio Law Abs. 472.

Therefore, appellants should have filed exceptions before the Probate Court. Once the account was settled and approved, a judgment was in effect entered which could only be vacated as provided in R.C. §2109.35. A declaratory judgment was not the proper method of doing so.

For these reasons, we conclude that the trial court acted properly in dismissing appellant's complaint for declaratory judgment.

Appellants' assigned error is overruled.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

John V. Corrigan, J.  
Nahra, P.J. and  
Ann McManamon, J.,  
Concur.

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

William K. Ziechmann,	:	Case No. 77198
et al.,	:	
	:	FINDINGS OF FACT
Plaintiffs	:	AND CONCLUSIONS
	:	OF LAW AND OPINION
-vs-	:	
	:	
Charlotte Adomaitis,	:	September 4th, 1985
et al.,	:	
	:	
Defendants	:	

The Court finds that F. Karl Ziechmann died testate on December 28, 1978 and attempted to distribute his entire estate through his Last Will and Testament of May 5, 1975. Item VI of decedent's Will stipulated that (A) the residue and remainder of the decedent's estate and (B) two vacant parcels of land, located at 2970 Warrensville Center Road, be distributed in equal one-half shares to William K. Ziechmann and Lore Gollnick, Item VI further stipulated that the testamentary share left to William K. Ziechmann was to be placed in a trust and held for the benefit of William K. Ziechmann.

The Executrix of decedent's estate, Charlotte Adomaitis, sold said two parcels of real property, in which William K. Ziechmann had a one-half interest, to the City of Shaker Heights in order to satisfy the outstanding debts of decedent's estate.

Plaintiff, William K. Ziechmann, seeks a declaratory judgment from this Court in order to void the sale of the two parcels of real property to the City of Shaker Heights, to place said property in trust for the plaintiff, and to grant money damages as a result of the alleged illegal

sale of real property. The defendants have filed a motion to dismiss plaintiff's action based upon several arguments.

I. Civil Rule 12(B)(6)—Plaintiff's complaint fails to state a claim upon which relief can be granted as a result of (1) Executrix was duly authorized by Will to act as Executrix and (2) decedent's Will specifically granted the Executrix authority to sell real property.

Decedent's Will jointly appointed Society National Bank and Charlotte Adomaitis as executors of his Last Will and Testament. Society National Bank specifically declined the appointment as executor and said declination was noted and recorded upon the Court's docket. Upon the refusal of Society National Bank to serve as executor, Charlotte Adomaitis properly applied for Testamentary Letters as required by O.R.C. §2113.12. The Probate Court granted Charlotte Adomaitis' application and ordered Letters Testamentary forthwith.

§2113.39 of the Ohio Revised Code provides that if an executor is authorized by the decedent's Will to sell real property, no order shall be required from Probate Court to authorize such sale.

§2113.39 Sale of property under authority of will. (GC § 10509-227)

If a qualified executor, administrator, or testamentary trustee is authorized by will or devise to sell any class of personal property whatsoever or real estate, no order shall be required from the probate court to enable him to act in pursuance of the power vested in him. A power to sell authorizes a sale for any purpose deemed by such executor,



administrator, or testamentary trustee to be for the best interest of the estate, unless the power is expressly limited by such Will.

Item IX, of the decedent's Will, expressly empowered the Executrix to sell any real or personal property in order to satisfy debts of the estate or general bequests. The Executrix was faced with a cash shortage and needed a cash flow in order to satisfy the debts of decedent's estate. Therefore, as permitted by decedent's Will, the Executrix sold two parcels of land, located at 2970 Warrensville Center Rd., to the City of Shaker Heights for a price of \$24,000.00 over the appraised value of the real property in question.

Since Charlotte Adomaitis was duly appointed as Executrix and decedent's Will clearly authorized the sale of real property, the sale of the two vacant lots to the City of Shaker Heights was valid and plaintiff's demand for the invalidation of said sale is groundless. Clearly plaintiff fails to state a claim upon which relief can be granted and said claim should be dismissed pursuant to Civil Rule 12(B)(6).

II. Plaintiff's action is barred by the doctrine of Res Judicata

Defendant's second basis for dismissal of plaintiff's action involves the doctrine of Res Judicata. §2109.35 of the Ohio Revised Code states that an order of fiduciary's account shall have the effect of a judgment. In this particular case, four separate partial accountings were approved by the Probate Court. The third partial accountings were approved by the Probate Court. The third partial accounting included the sale proceeds from the sale of the two vacant lots. This third accounting was



submitted to and approved by the Probate Court. Plaintiff made no objections to the sale of the land in question at the time of the third accounting.

The failure of the plaintiff to timely object to the sale of the property in question and the approval of the third partial accounting by the Probate Court is now Res Judicata as to the plaintiff.

IT IS, THEREFORE, ORDERED based upon the failure of the plaintiff to state a claim upon which relief can be granted and the concept of Res Judicata, that plaintiff's action is hereby dismissed with prejudice at plaintiff's costs, pursuant to Civil rule 12(B)(6).

Judge John E. Corrigan